Public Prosecutor v Hassim bin Hj Ma'asah and another appeal

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 42A-117 OF 2010 AND 42A-146 OF 2010
SU GEOK YIAM J
12 AUGUST 2012

Criminal Law — Corruption — Corruptly receiving gratification — Police officer charged with offences of corruptly asking and receiving gratification — Whether prima facie case established — Whether conduct of accused in running away and aggressively resisting arrest showed guilty mind — Whether accused succeeded in raising doubt in prosecution case — Whether presumption in s 42 of the Anti-Corruption Act 1997 triggered — Anti-Corruption Act 1997 ss 11(a) & 42

Criminal Procedure — Appeal — Conviction, against — Accused charged with offences of corruptly asking and receiving gratification — Whether prima facie case established — Whether conduct of accused in running away and aggressively resisting arrest showed guilty mind — Whether accused succeeded in raising doubt in prosecution case — Whether presumption in s 42 of the Anti-Corruption Act 1997 triggered — Whether conviction safe — Anti-Corruption Act 1997 ss 11(a) & 42

The accused was charged with two counts of corruption under s 11(a) of the Anti-Corruption Act 1997 ('the Act') for having received and obtained for himself, in his capacity as an agent of the Government of Malaysia, sums of cash on two separate occasions as an inducement not to take action against one Osman Saifuddeen. Osman had been arrested in a night club and his urine was tested and found positive for dangerous drugs. The first count charged the accused of having had received a sum of RM700 from one Mohd Sophian. The accused was alleged to have committed the offence in his room in his office at the Dang Wangi Police District Headquarters. The second count charged the accused of having received a sum of RM300 from one Muhammad Faizal in front of the Putra Restaurant at Kuala Lumpur. At the close of the prosecution's case the learned trial judge was satisfied that the prosecution had failed to establish a prima facie case against the accused on the first count. She, consequently, recorded an order of acquittal and discharge against him without calling for his defence. As for the second count she was satisfied that the prosecution had established a prima facie case against the accused. She, consequently, ordered him to enter his defence. At the close of the defence's case, the learned trial judge convicted the accused on the second count and imposed upon him a sentence of 12 months imprisonment from the date of

judgment and a fine of RM10,000 in default six months imprisonment. The public prosecutor filed the first appeal against the decision of the trial judge against the acquittal and discharge of the accused on the first count. The accused filed the second appeal against his conviction and sentence on the second count.

Held, dismissing the first appeal and allowing the second appeal and quashing the conviction and sentence:

(1) The answer of the accused to PW14 clearly showed that the accused did not agree to receive or accept the RM700 in order to reverse the result of the urine test from positive to negative. The accused had categorically told PW14 that it could not be done. He had also categorically told PW14 that PW7 could be released on bail (see paras 43–44).

(2) The failure of PW12 to take a photograph of the accused's room and the drawer of the steel cabinet in the accused's room in which the RM700 was allegedly placed by PW10 to corroborate the inconsistent testimonies of PW10 and PW14 was also fatal to the prosecution's case against the accused on the first count. There was a reasonable doubt raised by the defence whether there was in fact a steel cabinet with a drawer in the accused's room at the material time into which PW10 said he had placed the RM700 (see paras 50–51).

(3) The benefit of the doubt was, therefore, correctly given to the accused by the learned trial judge and there was no compelling reason to disturb the decision of the learned trial judge who had the advantage of seeing and hearing the prosecution's witnesses as they testified before her; *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1 referred (see para 56).

(4) The burden was on the prosecution to call the medical officer who certified that the urine test report of PW7 was negative and also the superior officer of the accused to explain that the only reason why it could have happened that way was because the urine sample of PW7 was switched by the accused as the burden was on the prosecution to prove the guilt of the accused and the accused had no burden to prove his innocence (see para 371).

(5) The conduct of the accused in running away and his aggressive conduct in resisting arrest gave rise to two possibilities. One was that he had a guilty mind because he had done something wrong. The other was that he believed he was innocent and that he had reacted in that manner out of a strong feeling of fear for his personal safety because the ACA officers did not identify themselves to him when they confronted him and attempted to arrest him. So his reaction when viewed in that perspective was a normal reaction and was not due to a guilty mind. By virtue of the reasons given by the accused and the weaknesses in the prosecution's case

the court could not rule out the second possibility. Hence the benefit of the doubt ought to have been given to him (see para 373).

(6) Had the learned trial judge considered the numerous weaknesses in the prosecution case, she would not have ordered the accused to make his defence to the second count. Having erroneously called for the defence of the accused, the learned trial judge ought to have held that the prosecution had failed to prove the second count against the accused as the accused had succeeded in raising a doubt in the prosecution's case that he had corruptly agreed to receive and did receive the RM300 as a bribe (see paras 384–385).

(7) The rebuttable presumption contained in s 42 of the Act that the accused had corruptly obtained the RM300 was not triggered off based on the evidence; *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 distinguished (see paras 389–390).

[Bahasa Malaysia summary

Tertuduh telah dituduh dengan dua pertuduhan melakukan rasuah di bawah s 11(a) Akta Pencegah Rasuah 1997 ('Akta tersebut') kerana menerima dan memperoleh untuk diri sendiri, dalam kapasitinya sebagai ejen Kerajaan Malaysia, sejumlah wang tunai dalam dua kejadian sebagai suapan untuk tidak mengambil tindakan terhadap Osman Saifuddeen. Osman telah ditangkap di kelab malam dan air kencingnya telah diuji dan didapati positif dengan dadah berbahaya. Pertuduhan pertama yang dibuat terhadap tertuduh kerana menerima sejumlah RM700 daripada Mohd Sophian. Tertuduh dikatakan telah melakukan kesalahan dalam bilik di pejabatnya di Ibu Pejabat Polis Daerah Dang Wangi. Pertuduhan kedua yang dibuat terhadap tertuduh adalah kerana menerima sejumlah RM300 daripada Muhammad Faizal di hadapan Restoran Putra di Kuala Lumpur. Di penutup kes pendakwaan hakim perbicaraan yang bijaksana berpuas hati bahawa pendakwaan telah gagal membuktikan kes prima facie terhadap tertuduh atas pertuduhan pertama. Beliau, seterusnya, telah merekodkan perintah pelepasan dan pembebasan terhadapnya tanpa memanggil pembelaannya. Berhubung pertuduhan kedua dia berpuas hati bahawa pendakwaan telah membuktikan kes prima facie terhadap tertuduh. Beliau, seterusnya, memerintahkannya memasukkan pembelaannya. Di penutup kes pembelaan, hakim perbicaraan yang bijaksaan telah mensabitkan tertuduh atas pertuduhan kedua dan mengenakan hukuman penjara 12 bulan terhadapnya dari tarikh penghakiman dan denda RM10,000 di mana sekiranya gagal enam bulan penjara. Pendakwa raya telah memailkan rayuan pertama terhadap keputusan hakim perbicaraan tersebut terhadap pelepasan dan pembebasan tertuduh atas pertuduhan pertama. Tertuduh telah memfailkan rayuan kedua terhadap sabitan dan hukumannya atas pertuduhan kedua.

Diputuskan, menolak rayuan pertama dan membenarkan rayuan kedua dan membatalkan sabitan dan hukuman: A

(1) Jawapan tertuduh kepada PW14 jelas menunjukkan bahawa tertuduh tidak bersetuju untuk menerima RM700 bagi tujuan menukar keputusan ujian air kencing daripada positif kepada negatif. Tertuduh dengan jelas memberitahu PW14 yang ia tidak boleh dilakukan. Dia juga memberitahu PW14 bahawa PW7 boleh dibebaskan dengan ikat jamin (lihat perenggan 43–44). B

(2) Kegagalan PW12 untuk mengambil gambar bilik dan laci kabinet besi dalam bilik tertuduh di mana RM700 yang dikatakan telah diletakkan oleh PW10 untuk menyokong keterangan yang tidak konsisten PW10 dan PW14 juga menjejaskan kes pendakwaan terhadap tertuduh atas pertuduhan pertama. Terdapat keraguan munasabah yang ditimbulkan oleh pembelaan sama ada pada hakikatnya kabinet besi dengan laci dalam bilik tertuduh pada masa matan di mana PW10 mengatakan telah meletakkan RM700 tersebut (lihat perenggan 50–51). C D

(3) Faedah keraguan adalah, dengan itu, wajar diberikan kepada tertuduh oleh hakim perbicaraan yang bijaksana dan tiada sebab ketara untuk mengganggu keputusan hakim perbicaraan yang bijaksana yang mempunyai kelebihan melihat dan mendengar saksi-saksi pendakwaan apabila mereka memberi keterangan di hadapan beliau; *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1 dirujuk (lihat perenggan 56). E F

(4) Beban adalah atas pendakwaan untuk memanggil pegawai perubatan yang mengesahkan bahawa ujian air kencing PW7 adalah negatif dan juga ketua pegawai tertuduh untuk menjelaskan bahawa itulah sahaja sebab kenapa ia boleh berlaku begitu adalah kerana sampel air kencing PW7 telah ditukar oleh tertuduh kerana beban adalah atas pendakwaan untuk membuktikan kebersalahan tertuduh dan tertuduh tidak mempunyai beban untuk membuktikan ketidakbersalahannya (lihat perenggan 371). G

(5) Perbuatan tertuduh melarikan diri dan kelakuan agresifnya yang enggan ditangkap menimbulkan dua kemungkinan. Satu adalah bahawa dia mempunyai fikiran bersalah kerana telah melakukan suatu yang salah. Satu lagi adalah dia percaya dia tidak bersalah dan bahawa dia bertindak sebegitu kerana mempunyai perasaan takut terhadap keselamatannya disebabkan pegawai tersebut tidak memperkenalkan diri mereka kepadanya apabila berdepan dengannya dan cuba menangkapnya. Oleh itu tindak balasnya apabila dilihat daripada perspektif tersebut adalah tindak balas biasa dan bukan kerana minda yang bersalah. Menurut sebab-sebab yang diberikan oleh tertuduh dan kelemahan dalam kes H I

pendakwaan mahkamah tidak boleh mengetepikan kemungkinan kedua. Justeru itu faedah keraguan patut diberikan kepadanya (lihat perenggan 373).

(6) Jika hakim perbicaraan yang bijaksanan mengambil kira pelbagai kelemahan dalam kes pendakwaan, beliau tidak mungkin memerintahkan tertuduh membuat pembelaannya terhadap pertuduhan kedua. Oleh kerana kesilapan memanggil pembelaan tertuduh, hakim perbicaraan yang bijaksana patut telah memutuskan bahawa pendakwaan telah gagal membuktikan pertuduhan kedua terhadap tertuduh kerana tertuduh telah berjaya menimbulkan keraguan dalam kes pendakwaan bahawa dia telah secara rasuah bersetuju menerima dan telah pun menerima RM300 sebagai suapan (lihat perenggan 384–385).

(7) Andaian yang boleh disangkal terkandung dalam s 42 Akta tersebut bahawa tertuduh telah secara rasuah memperoleh RM300 itu tidak tercetus berdasarkan keterangan; *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 dibeza (lihat perenggan 389–390).]

Notes

For cases on conviction against, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 383–384.

For cases on corruptly receiving gratification, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 138–150.

Cases referred to

Abdullah bin Yaacob v PP [1991] 2 MLJ 237, SC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)
PP v Koh Chee Meng [1991] 3 CLJ 58, HC (refd)
Soosay Dass v PP [1951] MLJ 57 (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401, SC (distd)

Legislation referred to

Anti-Corruption Act 1997 ss 11(a), 16, 42, 42(1), 45
Dangerous Drugs Act 1952 s 15(1)(a)

Wong Pui Yoke (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the prosecution.
Hanif Hassan (Hanif Hassan & Co) for the accused.

Su Geok Yiam J:

BACKGROUND

[1] There are two appeals which arose from a single case filed by the public prosecutor against the accused in the Kuala Lumpur Sessions Court.

[2] The accused was charged with two counts of corruption under s 11(a) of the Anti-Corruption Act 1997 (Act 575) ('the Act') for having received and obtained for himself, in his capacity as an agent of the Government of Malaysia, two separate sums of cash from two different persons on two separate occasions as an inducement not to take action against one Osman Saifuddeen bin Osman who was arrested in a night club and whose urine was tested and found positive for dangerous drugs.

THE FIRST COUNT OF CORRUPTION

[3] The first count charged the accused under s 11(a) of the Act, in his capacity as an agent of the Government of Malaysia, to wit, Sgt Hassim bin Hj Ma'asah, RF/68616, for having committed the offence of corruptly receiving for himself a gratification, to wit, a sum of RM700 in cash from one Mohd Sophian Osman bin Osman as an inducement for not taking action against one Osman Saifuddeen bin Osman who was suspected of having committed an offence under the Dangerous Drugs Act 1952.

[4] The accused was alleged to have committed the offence specified in the first count on 22 April 2006, between 2pm and 3pm, in his room in his office at the Dang Wangi Police District Headquarters in the Federal Territory of Kuala Lumpur.

THE SECOND COUNT OF CORRUPTION

[5] The second count charged him under s 11(a) of the Act, in his capacity as an agent of the Government of Malaysia, to wit, Sgt Hassim bin Hj Ma'asah, RF/68616, with the commission of the offence of corruptly obtaining for himself a gratification from one Muhammad Faizal bin Kamaluddin, to wit, a sum of RM300 in cash as an inducement for not taking action against one Osman Saifuddeen bin Osman who was suspected of having committed an offence under the Dangerous Drugs Act 1952.

[6] The accused was alleged to have committed the offence specified in the second count on 10 May 2006, at about 2.30pm, in front of the Putra Restaurant at 101, Jalan Putra in the Federal Territory of Kuala Lumpur.

THE PUNISHMENT PROVIDED UNDER S 16 OF THE ACT

[7] The offence under s 11(a) of the Act is punishable under s 16 of the Act with imprisonment for a term of not less than fourteen days and not more than twenty years and a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit,

whichever is the higher.

DECISION OF THE LEARNED TRIAL JUDGE

[8] The prosecution called 15 witnesses.

[9] At the close of the prosecution case the learned trial judge was satisfied that the prosecution had failed to establish a prima facie case against the accused on the first count. She, consequently, recorded an order of acquittal and discharge against him without calling for his defence.

[10] As for the second count she was satisfied that the prosecution had established a prima facie case against the accused. She, consequently, ordered him to enter his defence.

[11] The accused opted to make his defence to the second count by giving evidence on oath (DW1). He also called two other witnesses, namely, Siti Rohana bt Zainal, his wife, as his second witness (DW2) and Insp Nordin bin Ibrahim as his third witness (DW3).

[12] At the close of the defence case, the learned trial judge was satisfied that the accused had failed to raise a doubt in the prosecution case.

[13] She, accordingly, convicted him on the second count and having heard his plea in mitigation she imposed upon him a sentence of 12 months imprisonment from the date of judgment and a fine of RM10,000 in default six months imprisonment.

[14] Being dissatisfied with the acquittal and discharge of the accused on the first count, the public prosecutor filed the first appeal which is the main appeal against the decision of the learned trial judge to the High Court.

[15] Being dissatisfied with his conviction and sentence on the second count the accused filed the second appeal which is the cross-appeal against the decision of the learned trial judge to the High Court.

DECISION OF THIS COURT

[16] Having heard both the parties and considered the oral and written submissions of the parties and the appeal records, this court agreed with and accepted the submissions of learned counsel for the accused that the first appeal was without any merit and ought to be dismissed. As for the second appeal, this

court agreed with and accepted the submissions of learned counsel for the accused that it had merits and ought to be allowed.

[17] This court, consequently, dismissed the public prosecutor's appeal and affirmed the order of acquittal and discharge of the accused on the first count by the learned trial judge. This court allowed the accused's appeal on the second count, quashed his conviction and set aside his sentence of imprisonment and fine (the 'decision of this court').

[18] Being dissatisfied with the decision of this court the public prosecutor has filed a notice of appeal to the Court of Appeal.

[19] In its petition of appeal in the first appeal the public prosecutor has set out six grounds why its appeal ought to be allowed.

[20] In his petition of appeal in the second appeal the accused has set out nine grounds why his appeal ought to be allowed.

The prosecution case for the first count and the reasons of the learned trial judge for her decision on the first count at the close of the prosecution case

[21] The prosecution case against the accused for the first count and the reasons of the learned trial judge in acquitting and discharging the accused on the first count are as follows.

[22] A police party had arrested eight persons including Osman Saifuddeen bin Osman (PW7) ('Osman') and his two friends, namely, Nik Fairusrozi bin Mohd Fauzi (PW13) and (Mohamad Shafiq bin Mohamad Jamali (PW15) (the 'three friends') in a police raid on a night club, namely, Modesto Club (the 'nightclub'), in Jalan P Ramlee on Sunday, 22 April 2006 at 1am.

[23] The reason for their arrests was that their urine samples were tested positive for dangerous drugs at the night club.

[24] The three friends had gone to the nightclub together with PW7's girl friend, namely, Siti Hajar bt Md Rahim (PW14) on Saturday night. However, PW14 was not arrested by the police at the night club because her urine sample tested negative for dangerous drugs.

[25] PW7, PW13 and PW15 were then handcuffed by the members of the police party at the nightclub. They were taken initially to the Dang Wangi Police District Headquarters (the 'police station').

[26] PW14 then went to PW7's house where she informed PW7's brother, namely, Mohd Sophian Osman bin Osman (PW10), the complainant who is named in the first count of PW7's arrest by the police.

[27] In the meantime, the three friends were detained overnight in the police lock-up at the police station. On the following day they were taken to the magistrate's court where they were ordered to be remanded in police custody. They were then taken to the Cheras Police District Headquarters where they were placed under remand.

[28] As for PW14 and PW10, they went to the police station on the following morning with the intention of bailing out PW7 and his two friends. They met the accused who was the assistant investigating officer (the 'AIO') at the office of the accused at the police station.

[29] In her grounds of judgment the learned trial judge noted that PW14 and PW10 also saw the three friends inside the office of the accused. They saw that the hands of the three friends were cuffed and they were squatting on the floor inside the office of the accused.

[30] PW7 informed PW14 that the accused had asked him to find RM600 in order that he could be released on the same day.

[31] PW14 promised PW7 that she would try to look for the money and that she would return to the police station. While she was on her way home she received a phone call from the accused. He asked her whether she knew PW7.

[32] PW14 replied as follows:

> Saya kata kenal. Dia tanya macam mana. Saya jawab kalau boleh berilah peluang. Dia cakap peluang macam mana. Saya cakap kalau boleh selesailah. Selepas itu dia cakap mana boleh. Dia cakap kena ikat jamin. Saya Tanya berapa. Tapi saya tidak ingat amaun yang dicakapkan.

[33] PW10 then met the accused to discuss the possibility of converting the urine test result of PW7 from positive to negative in order to secure the release of PW7. According to PW10, the accused asked for RM1,500 in order to do that. The amount was subsequently reduced to RM1,000.

[34] The accused was alleged to have given to PW10 time until 1pm on the same day to pay him the money. According to PW14 she managed to raise a sum of RM650 by pawning her mobile phone and jewelry but she did not

produce any receipt from the phone shop and the pawnshop to corroborate her oral testimony. She said she added RM50 of her own money and succeeded in raising a total sum of RM700.

[35] She then went back to the office of the accused together with PW10. According to PW14 and PW10 (the 'two key prosecution witnesses'), the RM700 was then handed over to the accused in the room of the accused in accordance with the instructions of the accused by PW10 who placed it inside the drawer of a metal cabinet in the room of the accused.

[36] According to the two key prosecution witnesses the accused had walked to the back of his room, pulled out the drawer of his metal cabinet and said to them 'masukkan duit itu kat sini' in the Malay language which means 'place the money inside here' in the English language. The learned judge noted that the two key prosecution witnesses also said that the three friends were also present in the room of the accused and that they saw what the accused did.

[37] However, the learned trial judge noted that PW7 testified that he did not hear the conversation between the accused and PW7's girlfriend (PW14) and PW7's brother (PW10) concerning the request for the payment of the RM700 to the accused and the instructions of the accused to PW10 to place the money in the drawer of the metal cabinet in the room of the accused. The same applied to PW13 and PW15 who also testified that they did not hear that conversation.

[38] Hence, the learned trial judge ruled that the rebuttable presumption in s 42(1) of the Act was inapplicable. Apart from that the learned judge was satisfied that there was no corroboration of the oral testimonies of PW14 and PW10 as the money was never recovered by the ACA from the drawer of the metal cabinet in the room of the accused as no report was lodged by either of them before the money was allegedly handed over to the accused in that manner.

[39] So the learned judge recorded an order of acquittal and discharge against the accused on the first count at the close of the prosecution case.

REASONS FOR THE DECISION OF THIS COURT

[40] Below are the reasons why this court made the said decision on the first count.

[41] This court agreed with and accepted the reasons of the learned trial judge for her decision on the first count.

[42] She had expressed her doubts as to the credibility of the testimonies of PW10 and PW14 after having seen and heard them. She was not prepared to believe their testimonies. Her reason was the there was a failure by PW7 to corroborate their testimonies.

[43] Furthermore, she also took into consideration the answer which was given by the accused to PW14 and which was narrated by PW14 to this court. According to her the answer of the accused to PW14 clearly showed that the accused did not agree to receive or accept the RM700 in order to reverse the result of the urine test of the accused from positive to negative in order to save the accused from prosecution for having consumed a type of dangerous drugs, namely, syabu.

[44] This court noted that the accused had, in his answer to PW14, categorically told PW14 that it could not be done. He had also categorically told PW14 that PW7 could be released on bail.

[45] Apart from that this court also noted that PW14 and PW13 had also consistently testified that the accused had told them that a sum of RM600 was required to secure the release of the three friends on police bail. If what they said was true it would follow that each of the three friends had to raise RM200 before they could be released on police bail.

[46] However, this court also noted that one of the police witnesses, PW16, had testified that no money was in fact paid when all the three friends were released on police bail on Monday, 26 April 2006. PW15 also testified that he did not pay the RM200 to PW14 before or after his release on police bail. He further testified that PW14 also did not ask him to pay the RM200 to her.

[47] Therefore, this court noted that there were material contradictions between the oral testimonies of PW14 and PW13 on the one side and PW15 and PW16 on the other side which had cast doubt on the credibility and reliability of their oral testimonies.

[48] Hence, this court was of the view that the learned trial judge was correct in recording an order of acquittal and discharge against the accused on the first count.

[49] This court was satisfied that the learned trial judge acted correctly when she ruled at the close of the prosecution case that the accused in his submissions had succeeded in raising a doubt in the prosecution's case itself that the accused neither corruptly agreed to nor corruptly accepted a gratification of RM700 from PW10 as an inducement not to take action against PW7 as stated in the first count.

The failure of PW12 to draw a sketch plan and to take photographs of the interior of the room of the accused at the police station to show the existence and location of the steel cabinet, the drawer of the steel cabinet in which the RM700 was allegedly placed by PW10, the table and the chairs at which the accused and PW10 and PW14 were allegedly seated and the spot on the floor where the three friends were allegedly squatting

[50] This court was also of the view that the failure of PW12 to take a photograph of the accused's room and the drawer of the steel cabinet in the accused's room in which the RM700 was allegedly placed by PW10 to corroborate the inconsistent testimonies of PW10 and PW14 was also fatal to the prosecution case against the accused on the first count.

[51] The reasons are firstly, PW10 and PW14 did not lodge any report before or immediately after the RM700 was placed in the drawer by PW10.

[52] Secondly, the RM700 was never recovered by the ACA officers from the drawer as P4 was only lodged two weeks after the alleged incident by PW11 who was not present in the accused's room when the RM700 was allegedly placed by PW10 in the drawer.

[53] Thirdly, the ACA had no opportunity to set up a trap for the accused in order to confirm the truth of the allegations of PW10 and PW14 and PW11's allegations constituted hearsay evidence and were clearly inadmissible.

[54] Therefore, there was a reasonable doubt raised by the defence whether there was in fact a steel cabinet with a drawer in the accused's room at the material time into which PW10 said he had placed the RM700.

[55] PW14 said she did not see the RM700 being placed in the drawer by PW10. PW7 and his two friends did not see PW10 placing the RM700 in the drawer.

[56] The benefit of the doubt was, therefore, correctly given to the accused by the learned trial judge and there was no compelling reason to disturb the decision of the learned trial judge who had the advantage of seeing and hearing the prosecution witnesses as they testified before her (see *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1).

The prosecution case for the second count and the reasons of the learned trial judge for ordering the accused to enter his defence on the second count

[57] The prosecution case against the accused for the two count and the reasons of the learned trial judge for ordering the accused to enter his defence on the second count are as follows.

[58] As stated earlier the two witnesses had testified that PW10 had placed a sum of RM300 inside the drawer of the steel cabinet in the room of the accused at the police station upon the request of the accused as part of a sum of RM1,000 which was solicited by the accused to secure PW7's release.

[59] According to the two witnesses, subsequent to that incident which occurred in the room of the accused in his office at the police station, PW14 and PW10 had another discussion with the accused for the release of PW7. According to them the accused informed them that PW7 would be released on Monday, 26 April 2006, at the very latest. However, when they phoned up and spoke to the accused on Monday, 26 April 2006, the accused asked them to bring along a sum of RM300 being the balance of the RM1,000 which the accused had solicited from PW10 in order to secure the release of PW7.

[60] Nevertheless, on Monday, 26 May 2006, the three friends were released on police bail although the RM300 being the balance of the RM1000 had not yet been paid to the accused.

[61] According to PW13, he was told by PW14 that PW14 needed RM600 in order to bail out the three friends. On the other hand PW7 told him that each of them had to raise RM200 to settle the case.

[62] PW15 also said that the accused asked for money to secure their release from their remand. He was not sure how much each of them was supposed to pay but it was in the region of RM200 as it involved a sum of RM600 as a package for the release of the three of them.

[63] PW15 testified as follows:

> 'Sarjan Hassim minta duit untuk dilepaskan dari reman. Saya tidak pasti berapa tapi dalam RM 200'. '… RM 600 package untuk 3 orang lepas'.

[64] The bailors for PW7 were his girlfriend, namely, Siti Hajar bt Md Rahim (PW14) and his brother, namely, Mohd Sophian Osman bin Osman (PW10). The bailor for PW13 was his father. The bailor for PW15 was his older sister.

[65] The learned trial judge noted that according to the evidence of the two key prosecution witnesses, namely, PW14 and PW10, after the release of the three friends, PW13 paid RM200 to PW14 but they could not raise the RM300 being the balance sum of RM1000 to pay the accused in order to induce the accused not to take action against PW7 who was suspected of having committed an offence under the Dangerous Drugs Act 1952 (the 'DDA').

[66] So PW14 and PW10 consulted PW7's friend who is the complainant in the second count, namely, Muhammad Faizal bin Kamaluddin (PW11), as they knew that PW11 is the son of a policeman.

[67] PW11 who is a trap witness is undoubtedly the key prosecution witness for the second count together with four ACA officers, namely, PW1, PW2, PW3 and PW4 who are also trap witnesses. By virtue of s 45 of the Act their evidence does not require corroboration. Therefore, their evidence can be accepted by the learned trial judge if it is consistent and credible.

[68] Since their testimonies are very material to the prosecution case against the accused on the second count this court is of the view that it is incumbent on this court to scrutinise their testimonies and to explain how and why the learned trial judge erred when she ruled that the prosecution had succeeded in proving the second count against the accused beyond reasonable.

PW11'S TESTIMONY

[69] This court shall deal with PW11's testimony first.

[70] PW1 testified in his examination-in-chief that he is the son of a policeman at the Ampang Police District Headquarters. He had left school after he had completed his Form 3 education.

[71] He was working as a cashier at a cyber cafe. In 2006 he was working as a part-time car re-possessor for a Chinese employer. PW7 and PW14 were his friends. Sometime between the end of April 2006 and early May 2006 he had visited PW7 in PW7's house. PW7 informed him that he wished to be a policeman.

[72] On the following day when he met up with PW7 in PW7's house in the presence of PW14 he saw from PW7's face that PW7 was hiding something from him. He asked PW7 what was the problem.

[73] PW7 related to him his problem concerning his arrest in the night club and his subsequent remand at the Dang Wangi Police Station because his urine was tested positive for dangerous drugs.

[74] PW7 told him that the name of the investigating officer (the 'IO') of his case was Sgt Hassim and that the IO had asked him to pay RM1,000 to the IO. He had managed to pay the IO a sum of RM700 leaving a balance of RM300 unpaid but the IO wanted him to pay the remaining RM300.

[75] More importantly, PW7 also told PW11 that the IO had threatened to re-arrest him if he failed to pay the IO the RM300.

[76] PW7 then asked PW11 to help him raise the sum of RM300.

[77] PW11 testified that he failed to raise it by borrowing from his friends and his mother. However, he did not tell his mother why he needed to borrow the RM300 from her. He also did not inform his father about the matter as it did not involve his father.

[78] PW11 knew a policeman by the name of Sgt Hassim who was working at the Tun Razak police station. However, he did not know whether Sgt Hassim, the IO of PW7's case, and that Sgt Hassim were the same person.

[79] Using PW7's mobile number, he called the IO and spoke to him about PW7's case. He asked the IO what would happen to PW7 if PW7 could not pay the sum of RM300. The IO told PW11 that he would arrest PW7.

[80] PW11 then told the IO that he (PW11) would pay him the RM300 because PW7 is his close friend and he would not allow PW7 to be detained in the lock-up. According to PW11, the IO also threatened him because he had also told PW11 that if PW11 could not pay him the RM300, he would also arrest PW11.

[81] So, according to PW11, he was forced to use his own initiative by telephoning the ACA in order to seek assistance from the ACA since PW7, his close friend, had received a threat from PW7. He then reported to the ACA that Sgt Hassim asked for money and that Sgt Hassim had also threatened his close friend, namely, PW7.

[82] Apart from that he also testified that on the day following the lodging of P4, he received a phone call to his Nokia mobile phone bearing the No 013-2458557 from the IO asking him about the payment of the RM300 that same afternoon.

[83] However, he asked for a deferment on the ground that his mother had not yet banked the money into his account. On the same night the IO phoned him again but he did not answer the call because he was afraid. He then informed the ACA of the IO's call and asked the ACA what was his next course of action. He, PW7 and PW14, then met up with the ACA officer, namely, Puan Nik Asiah bt Nik Omar (PW3) at a food stall to discuss the matter. PW3 had just finished work. She took down his report, briefly.

[84] On the following morning, on 10 May 2006, all three of them went to the ACA office in the Federal Territory of Kuala Lumpur where he lodged his report (P4) at 11am against the accused for having demanded a bribe from PW7.

[85] In P4, PW11 alleged that two weeks earlier he was informed by PW7 that the accused had demanded a bribe of RM1,000 from PW7 as a consideration for the release of PW7 who was being detained in the lock-up by the police after his urine was tested positive for dangerous drugs.

[86] After lodging P4 he was instructed by three ACA officers, namely, Madam Lau Sor Pian (PW12), PW3 and Mohd Tarmize bin Abdul Manaf (PW2) to phone the accused to arrange to meet the accused in order to pay to the accused the RM300.

[87] Another ACA officer, namely, Muzilah bin Adzmi (PW8), who was known to PW11, had expressed to PW11 his view as to how to go about arresting the accused.

[88] PW11 then phoned the accused using his mobile phone. His phone conversation with the accused was recorded by PW8. The prosecution tendered the taped recording (P12) of the phone conversation and the transcript (P14) of the taped recording.

[89] In the phone conversation PW11 asked the accused where he could meet up with the accused. PW11 identified himself to the accused as Farid although his real name was Faizal because he was afraid of the accused. He addressed the accused as 'Jan' which was a short form for 'Sarjan' in Malay which means 'Sergeant' in English.

[90] The accused instructed PW11 to meet him at a mamak restaurant in front of The Mall (the 'meeting place').

[91] PW11 was also instructed by the ACA officers to go to the meeting-place to meet the accused. He was given RM300 in marked notes to hand over to the accused. He placed the marked notes in his right trousers' pocket. He was instructed by PW3 to give the pre-arranged signal to the arresting party of the ACA by putting both his hands inside both his pockets after he had handed over the marked notes to the accused.

[92] He then left the office of the ACA and got onto PW2's motorcycle, alone. About five minutes later he received a call on his mobile phone from the accused.

[93] The accused asked him to hurry up. PW11 told the accused he was already on his way to meet the accused at the meeting place. Upon arriving at the meeting place he phoned the accused who told him that he was driving a Kia van.

[94] After the accused had arrived at the meeting place he and the accused walked towards a table which was situated near the television inside the restaurant. Both of them then sat down facing each other at the table. They spoke for a while. The accused then got up and went to the counter to make payment. After that they left the restaurant.

[95] As the accused walked beside him on the right of PW11, the accused whispered to him and asked him about the money. PW11 then took out the marked notes from his right trousers' pocket and handed them over to the accused. The accused took the marked notes in his left hand.

[96] PW11 then told the accused he was leaving. As PW11 was approaching near the motorcycle he gave the pre-arranged signal to the ACA officers. He could see the ACA officers detaining the accused. He also saw the accused throwing away the RM300. PW11 then took a taxi to the office of the ACA.

[97] PW11 then informed PW7 and PW14 that the ACA had arrested the accused.

[98] When he was cross-examined by learned defence counsel, PW11 testified that PW7 told him while they were in PW7's house that he had consumed drugs, namely, syabu, that his urine was tested positive for drugs and that was the reason why he was very scared when he was arrested by the police at the night club.

[99] PW11 also agreed with the suggestion of learned counsel that PW7 had asked him for his assistance to do something in order that PW7 would be let off from his drug offence.

[100] PW11 also agreed with the suggestion of learned counsel that at the time when PW7 asked PW11 for his assistance PW14 was also present but apart from the three of them no-one else was present.

[101] PW11 disagreed with the suggestion of learned counsel that what he had testified in his examination-in-chief that the accused had asked for RM1,000 was not true.

[102] PW11 also disagreed with the suggestion of learned counsel that what

he had testified in his examination-in-chief about PW7 telling him that he had paid RM700 to the accused was not true. However, PW11 agreed with the suggestion of learned counsel that the accused never asked him (PW11) for the RM300. A

[103] PW11 also disagreed with the suggestion of learned counsel that the accused never told him that he would arrest PW7 and him if the RM300 was not paid. B

[104] PW11 explained that the accused and Sgt Hassim of the Jalan Tun Razak police station were two different persons. He had known the latter for about two years prior to the incident but the former was unknown to him. He was afraid that the accused would arrest him because he used to frequent the night club. He explained that those policemen who did not have work to do would find fault with him and the others for frequenting the night club. C D

[105] He also said that on 10 May 2006, the three of them, ie he, PW7 and PW14 had lodged reports with the ACA. He had lodged P4 because the accused had threatened him. As for PW14 she had lodged her report because of the payment of the advance of RM700 to the accused. E

[106] He also disclosed that on the night of 9 May 2006 he had suggested to PW7 and PW14 that a report be lodged with the ACA against the accused and that both of them had agreed with his suggestion. F

[107] At the meeting-place he and the accused spoke for about 15 minutes. He had handed over the marked notes to the accused while they were still in the restaurant. This happened shortly after the accused had made payment at the counter and while they were in the midst of walking out of the restaurant. G

[108] He disagreed with the suggestion of learned counsel that the accused did not ask him for the RM300. He also disagreed with the suggestion of learned counsel that he had concocted his testimony in order to frame up the accused and in order to prevent any further action from being taken against him and PW7 by the police. H

[109] He also disagreed with the suggestion of learned counsel that he had concocted the contents of his report (P4) to the ACA. I

[110] In his re-examination, PW11 reiterated that the contents of his report (P4) were true, that they were not concocted and that he had no intention to frame anyone.

[111] He also retracted what he had said in his cross-examination that PW7 and PW14 had also lodged reports with the ACA. He testified that they did not lodge any report but only gave statements to the ACA. He reiterated that the accused and Sgt Hassim of the Jalan Tun Razak police station were two different persons.

PW12'S TESTIMONY

[112] PW12 who was a member of the ambush party stationed at the meeting-place testified, inter alia, in her examination-in-chief that she attended a briefing after P4 was lodged. She and the other ACA officers who were assigned to the case were briefed as follows.

[113] The target of the trap was the accused, that the trap was timed at 2.30pm at the meeting place and that the pre-arranged signal which was given to PW11 was to tuck his shirt into his trousers after he had handed over the marked notes to the target.

[114] After the briefing she proceeded to the meeting place together with three other ACA officers. They were Ramlan bin Ahmad (PW5), Tenmolly and Rosli. The other ACA officers went to the meeting-place separately.

[115] Upon arriving at the meeting-place she sat down at one of the tables inside the restaurant. While she was seated at her table she saw PW11 entering the restaurant together with a man. She then saw them walking past by behind her table. Both of them then sat at another table which was behind her table.

[116] She identified the accused as the man whom she saw with the PW11.

[117] She could not see what they were doing because they were seated at their table which was behind the table where she was seated. About 15–20 minutes later she saw both of them walking towards the counter.

[118] She then saw both of them walking out of the restaurant. She instructed one of the ACA officers, namely, Izaq, to tail them as she was seated next to the wall of the restaurant and it was easier for Izaq to get up from his side of the table in order to tail them.

[119] As she got up from her seat at her table she saw three other ACA officers, namely, Edwin Ak Ipok (PW1), PW5 and Ali Akhbar, attempting to arrest the accused. She saw that they were struggling with the accused in front of the restaurant. She saw that the accused was angry and was actively resisting being arrested.

[120] Finally, while she was still inside the restaurant she saw that Edwin Ak Ipok (PW1) had succeeded in arresting the accused. The other ACA officers then tried to calm the accused down. She then drew a sketch plan (P1) of the scene of the incident showing the tables where the ACA officers including her were seated, the table where the accused and PW11 were seated, and the place where the accused was arrested by PW1.

[121] Upon returning to her office she drew another sketch plan (P3). She was then appointed to be the IO of the case by Encik Muzilah bin Adzmi (PW8).

[122] After she had completed her investigations which included recording the statements from all the witnesses and also the statement of the accused, making a transcript of the taped recording of the phone conversation between PW11 and the accused on 10 May 2006 at 1.30pm and obtaining all the documentary evidence, the physical evidence including the marked notes, the taped recording of the phone conversation and the mobile phones of the accused and PW11 she had referred the investigation paper (the 'IP') to her superior officer together with her recommendation that the accused be charged with the two counts of corruption.

[123] The first count was for receiving and accepting the RM700 from PW10 in order not to take action against PW7. The second count was for obtaining the RM300 from PW11 in order not to take action against PW7.

[124] On 30 November 2006, she resigned from the ACA and another ACA officer, namely, Encik Nik Zam bin Nik Man, (who was offered to the defence at the close of the prosecution case) took over the LP and all the exhibits connected with the LP which she had obtained in the course of her investigations and which she had kept in her locked steel cabinet. She had surrendered the key of her locked steel cabinet to the director of the ACA of the Federal Territory of Kuala Lumpur upon tendering her resignation.

[125] When she was cross-examined by learned counsel she disagreed with his suggestion that she was not competent to be the IO of the case as she was biased against the accused as she had taken part in the trap which was set up by the ACA to detain and arrest the accused.

[126] She also disagreed with his suggestion that the accused did not agree to receive the RM700 as per the report (P4), that during the trap laid for the accused at the restaurant the accused did not receive the RM300 from PW11 and that the accused did not solicit a sum of RM1,000 in order to settle the case against PW7.

[127] Nevertheless, she agreed with his suggestion that she did not record any statement from any of the witnesses prior to the trap laid for the accused at the restaurant. She also agreed with his suggestion that she had only recorded all the statements from all the witnesses after the accused was arrested at the restaurant.

[128] In her re-examination, she explained that she could not hear the conversation between the accused and PW11 because there were other customers in the restaurant and the television which was situated behind her was switched on very loudly.

[129] She also explained that she was competent to be the IO of the accused's case because she could neither see nor hear what had transpired between the accused and PW11 at the meeting place. She also explained that she was not biased against the accused because she was not the officer who had arrested the accused at the meeting place and that she was only appointed the IO in the office of the ACA in Kuala Lumpur after the accused was arrested.

PW8'S TESTIMONY

[130] PW8 was the ACA officer who was instructed by his superior officer, namely, Mohamad Tarmize bin Abdul Manaf (PW2) to make a recording on a tape of the phone conversation between PW11 and the accused on 10 May 2006 which was the same date that PW11 had lodged P4.

[131] After he had received PW2's instruction he took PW11 into his room. He then set up the paraphernalia for the recording. He followed the standard procedure for the recording. PW11 told him that his mobile phone was not functioning properly. So PW8 borrowed the mobile phone of another ACA officer, namely, Puan Umi Kalsom. He then removed the sim card from PW11's mobile phone and inserted it into Puan Umi Kalsom's mobile phone (the 'borrowed phone').

[132] According to PW8, PW11 then used the borrowed phone to call and speak to the accused for three minutes.

[133] PW8 was able to identify P12 as the taped recording of PW7's phone conversation with the accused.

PW13'S TESTIMONY

[134] PW13 testified that he was arrested together with PW7 and PW15 because their urine samples were tested positive for drugs. They were initially

detained in the lock-up of the Dang Wangi police station. The three of them were, subsequently, taken to and detained for three days in the Pudu lock-up.

[135] While they were being taken to the Pudu lock-up PW7 had told him that each of them had to pay RM200 in order to settle each of their cases. He had then phoned his sister to bring along a sum of RM200 to secure his release but his sister did not raise the money to secure his release.

[136] Prior to what was told to him by PW7 concerning the RM200 in order to secure their release on bail, he had also seen PW7 and PW14 speaking to the accused about something. After the conversation between PW7 and PW14 with the accused PW14 told him that she needed RM600 in order to bail out the three of them.

[137] He was also told by PW14 that he had to reimburse her a sum of RM200 which she had raised by pawning her gold chain in order to bail him out.

[138] He was released on 20 April 2006 after his father had stood surety for his bail. PW7 and PW15 were bailed out by PW14.

[139] No further action was taken against him after his release.

[140] When he was cross-examined by learned counsel for the accused PW13's testimony was consistent with the testimony which he had given in his examination-in-chief. He did not know and he also did not ask the police at the police station what was the result of his urine test. He also said that he had paid to PW14 a sum of RM200 as requested by her a week after he was released on police bail.

[141] In his re-examination he explained that he did not enquire from the police the result of his urine test because he thought that his case was settled after PW14 said she had paid RM600 to the accused to settle his case and the cases of PW7 and PW15 and after he was bailed out by his father.

[142] This court noted that there was a material contradiction between the testimony of PW13 and that of PW7 on the fact-in-issue whether PW7 had spoken to the accused at the police station. PW13 said he saw PW7 and PW14 speaking to the accused at the police station. However, in PW7's testimony which will be dealt with in more detail later, he said that he did not speak to the

accused at the police station.

PW14'S TESTIMONY

[143] Since the second count is closely related to the first count, it is important for this court to set out the salient aspects of PW14's testimony relating to the first count.

[144] In her very lengthy examination-in-chief, PW14 had testified that on the morning following the arrest and detention of the three friends when she went to see PW7 at the police station it was PW7 who had asked her to raise RM600 to secure his, PW13's and PW15's release.

[145] She had also met the accused at the police station that morning together with PW10 to settle PW7's case. PW10 asked the accused to settle the case against his brother (PW7) by reversing the result of PW7's urine test ie by changing the positive result to a negative result but she did not hear the discussion between PW10 and the accused.

[146] Initially the accused asked for a sum of RM1,500. PW10 requested that it be reduced to RM1,000. The accused agreed and she asked for some time to raise the money. The accused acceded to her request. He gave her until 1pm the same day to raise the money.

[147] She then left the police station together with PW10 to raise the RM1000. She went to Taman Melawati to pawn her mobile phone and her jewelry. She managed to raise RM650 from pawning the two items. She could not produce the receipts for the two items. She explained that she had lost the receipts for both the items as the case had occurred a long time ago. She added RM50 of her own money to the RM650 making the total amount that she had raised to be RM700.

[148] She then went back to PW7's house to shower and change her clothes. She then phoned the accused at 2pm to ask him where to meet up with him. The accused told her to meet him in his room at the police station.

[149] She and PW10 then went to meet up with the accused in his room at the police station. She did not speak to the accused. She merely handed over the money to PW10. She then saw PW10 walking straight to the steel cabinet inside the room of the accused.

[150] Initially she said that PW10 then took out the money from his right pocket and placed the money inside the drawer of the steel cabinet upon being

instructed to do so by the accused. Subsequently, she said that she did not see the money which was being placed by PW10 inside the drawer. A

[151] The steel cabinet was situated near to the table of the accused in the room but slightly in front on the side of the table where the accused was seated. B

[152] PW10 again asked the accused to reverse the result of PW7's urine test result.

[153] PW14 then asked when PW7 could be released. The accused told her at the latest by Monday, 26 April 2006. She and PW10 then left the police station. C

[154] On Monday, she phoned the accused to ask him when PW7 could be released. He told her PW7 could be released on that day. He asked her to bring along RM300 being the balance of the RM1000. She told him she did not have the money and she asked him for a deferment. D

[155] She then went to the police station. After she had signed the bail bond for PW7, PW7 was released. Both of them went home. She told PW7 that she needed to raise RM300 to pay to the accused. E

[156] Nothing happened to PW7 after PW7's release under police bail but she met up with PW11 either on 28 or 29 April 2006 to ask him for assistance to raise the RM300 to pay the accused as she and PW7 could not raise the money by them selves and they needed the assistance of their friends. F

[157] She testified that she overheard PW11 phoning and speaking to the accused from his mobile phone as the loudspeaker of the phone was switched on. However, she did not hear clearly what was said by the two of them as she was not paying attention to their conversation. G

[158] As stated earlier in these grounds of judgment it is very significant that when PW14 was cross-examined by learned counsel for the accused she agreed with his suggestion that when she phoned the accused and asked the accused to settle PW7's case if possible the accused had said it could not be done. His reply showed very clearly that he did not agree to PW7's request to settle PW7's case. It is also very significant that PW14 agreed with the suggestion of learned counsel for the accused that when she found out that PW7's urine test result was positive she was very troubled because PW7 could be imprisoned and she was prepared to do whatsoever in order to ensure that PW7 did not go to prison. H I

[159] At the material time she was also very much in love with PW7 who was her boyfriend. However, at the time she testified in court against the accused she had broken up with PW7.

[160] She also agreed with his suggestion that PW10 also assisted her in her efforts to keep PW7 from being sent to prison.

[161] However, she disagreed with his suggestion that she and PW7 had the intention to frame up the accused in order to disrupt the investigations which were undertaken by the accused against PW7 in order to ensure that no action was taken to prosecute PW7 in connection with his consumption of drugs as PW7's urine was tested positive for dangerous drugs.

[162] PW14 said that she was not sure whether the accused had asked PW11 for the RM300 being the balance of the RM1,000 which she had said in her examination-in-chief the accused had solicited from PW10 in order to reverse the positive result of PW7's urine test for drugs.

[163] When she was cross-examined by the learned DPP she said that she could not be sure for how long she and PW10 were in the room of the accused during the incident when PW10 allegedly placed the RM700 in the drawer of the steel cabinet. She estimated the time to be about half an hour.

[164] She did not see PW10 holding the RM700 and placing it inside the drawer.

PW7'S TESTIMONY

[165] It is very important for this court to scrutinise the testimony of PW7. This is because the testimonies of PW14 and PW11 are heavily dependent on the testimony of PW7. As stated earlier, PW11 had agreed with the suggestion of learned counsel that PW7 had asked him for his assistance to do something in order that PW7 would be let off from his drug offence.

[166] PW11 also agreed with the suggestion of learned counsel that at the time when PW7 asked PW11 for his assistance PW14 was also present but apart from the three of them no-one else was present.

[167] PW7 testified that at the time of his arrest he was unemployed. So in order to occupy his time he worked part-time as an office boy in his father's office in Taman Melawati. Coincidentally, PW14 had said that she had pawned her mobile phone and jewelry in Taman Melawati for a total sum of RM650 but she had lost the receipts.

[168] On the other hand, PW10 said she had pawned the two items for a total sum of RM600 and that she had added RM100 of her own money making a total sum of RM700.

[169] Her failure to produce the receipts which were so important to corroborate her oral testimony against the accused on the first count and the undisputed fact that PW7's father had an office in the same housing estate (but according to their testimonies neither she nor PW10 had informed PW7's father that PW7 had been detained by the police and she also acted as the surety for PW7 instead of PW7's father or PW7's brother, PW10) gave rise to a serious doubt in the credibility and truth of her testimony that the accused had initially solicited from her and PW10 a sum of RM1,500 which was subsequently reduced to RM1,000 in order not to take action against PW7.

[170] The reason is that her allegation could have been easily concocted by her in order to frame the accused in order to achieve her objective of saving PW7 from a prosecution under the DDA for a criminal offence, ie self administration of syabu, a type of dangerous drug as evidenced by the positive result of his urine test.

[171] As it turned out, PW7, his brother, PW10, his then girlfriend, PW14 and his friend, PW11, the son of a policeman, who had testified, albeit, unconvincingly, incredibly and unreasonably, that he did not even ask his father for advice concerning PW7's arrest and detention by the police party had succeeded in turning the table around and against the accused.

[172] PW14 had testified that because she was so much in love with PW7 at the material time she was prepared to do anything (although she did deny, albeit, unconvincingly, to this court and to the learned trial judge that she had framed the accused to suit her objective) in order to secure PW7's release and to ensure that PW7 would not be sent to prison.

[173] The reason is that the undisputed facts showed that it was the accused who was prosecuted for having committed two offences under the Act while PW7 and his two friends were never charged under the DDA although their urine samples were tested positive for dangerous drugs.

[174] Even PW14 had the audacity to testify that PW10 had asked the accused to reverse the positive urine test result of PW7 in order that PW7 would not be charged under the DDA and the accused had asked for RM1,500 from them in order to do that.

[175] At p 213 of the appeal record, she said as follows:

> … saya dan Boy iaitu abang Saiuddin jumpa Sarjan Hassim untuk berbincang di balai polis. Saya boleh cam Sajan Hassim. Dia ada di mahkamah. (OKT dicamkan). Boy berbincang untuk menegatifkan air kencing Osman Saifuddin. Saya tidak berapa dengar perbualan. Boy yang berbincang. Sarjan Hassim meminta daripadanya RM 1,500.00. Boy minta dikurangkan sebanyak RM 1,000.00. Setelah berbincang kami bersetuju dan berusaha untuk cari duit itu sebelum pukul 1.00. Sarjan Hassim meminta RM 1,000.00. Masa itu saya tiada 1,000.00 dan saya minta tempoh untuk mencari sehingga pukul 1.00. Saya dan Boy pulang untuk cari duit.

[176] However, when PW10 was called to the witness stand he did not testify to that effect. Hence, there was a very material contradiction between their testimonies and the end result was that PW14's testimony constituted hearsay evidence and was clearly inadmissible.

[177] PW10 testified that he went to the police station to see PW7 upon being informed by PW14 that the three friends had been arrested by the police and were detained at the police station. He asked the accused how was his brother's case. The accused told him his brother's case was a serious case. He asked the accused to close the cases of the three friends.

[178] The accused responded by asking him to pay RM1,500 to settle each of the cases of the three friends. When he told the accused the amount was too big as he did not have money the accused asked him to give to the accused RM3,000, ie 1,000, 1,000, 1,000 which mean 1,000 for each person. He did not reply. He merely said he would inform the accused before 1pm the same day.

[179] At pp 142–143 of the appeal record, PW10 said as follows in Malay:

> Saya tanya macam mana kes adik saya. OKT cakap 'kes dia teruk' dan dia kata 'kau bagilah, RM 1,500.00 (seribu setengah) untuk setiap seorang untuk kes'. Saya agak faham apa yang OKT cakap. Jaja pada masa itu ada di bahagian pintu, antara dalam dan luar. Saya cakap banyak sangat itu encik saya tiada duit. Dia kata bagi 3,000 ajelah, 1,000.00, 1,000, 1,000.00 maksudnya 1,000.00 seorang. Saya tidak reply apa-apa. Saya kata sebelum pukul 1.00 saya akan beritahu.

[180] So there was another material contradiction between the testimonies of PW14 and PW10. The former said the accused asked for RM1,500 to settle PW7's case. The latter said the accused asked for RM1,500 to settle each of the three friends' cases. This would make a total of RM4,500 for the three friends but the accused reduced it to RM3,000 ie RM1,000 after he had informed the accused that he had no money.

[181] Hence the possibility of any one of them or all of them fabricating and concocting evidence against the accused to fix up the accused arising possibly from their anger and dissatisfaction against the accused for having not only detained PW7 and his two friends at the night club but also in conducting the urine tests on PW7 and his two friends and their concern and love for PW7 and his two other friends is a real and not a remote possibility.

[182] Therefore, there was a strong possibility that all of them had conspired to frame the accused in order to achieve their objective of saving the three friends, especially, PW7 from a prosecution under the DDA.

[183] In the year 2009, PW7 joined the Royal Malaysian Police Force as a policeman. So he had succeeded in realising his ambition to become a policeman but at what cost to the accused?.

[184] At the time he testified in court against the accused before the learned trial judge on 1 April 2010 he was already working as a policeman.

[185] PW7's testimony was, surprisingly, very brief unlike the testimonies of PW14 and PW11.

[186] He identified the accused as a member of the police party who had arrested him, PW13 and PW15 at an entertainment centre after their urine samples were tested positive for dangerous drugs.

[187] He testified that he was arrested together with his friends excluding his ex-girlfriend, PW14, at the entertainment centre along Jalan P Ramlee on Saturday, 22 April 2006 at 1am during a raid conducted by the police. However, he could not even remember the name of the entertainment centre.

[188] He also could not remember what had transpired during the raid apart from the fact that his urine and that of his friends who were similarly detained by the police were tested positive for dangerous drugs. He then sent a message to PW14 that he would be taken to the police station from the entertainment centre.

[189] At the police station, the police took his photograph, his finger prints and his personal particulars. He also met Sgt Hassim who was the AIO of his case. He identified the accused in the dock as the AIO of his case.

[190] Subsequently, his brother (PW10) and PW14 went to see him at the police station. They saw him for about half an hour. He saw the accused speaking to PW10 and PW15.

[191] Initially he said that the three of them were discussing about his problem ie that the result of his urine test was positive and what would be the penalty, presumably, for the offence which he had committed under the DDA.

[192] Subsequently, he changed his story and said that he did not hear what the three of them were talking about. He also said that he did not speak to anyone.

[193] After that he was taken to the Cheras Police District Headquarters to be remanded and after that to the Pudu lock-up to be further remanded. He was then taken back to the police station.

[194] PW14 then bailed him out from his detention but he could not remember what transpired at that time. This court found his evidence difficult to believe since it is not every day that a person is arrested, detained and released on police bail. This is especially so for a person who has expressed a strong desire to be a policeman.

[195] After PW7 was released on police bail he met up with PW11 and PW14.

[196] He asked PW11 to settle his case by speaking to and asking the AIO the outcome of his case. He said he did not speak to the AIO himself about the matter as he was not clever in speaking to the AIO.

[197] This court found PW7's reason for not speaking directly to the accused not only ridiculous but also inherently incredible. PW7 had no communication or language problem with the accused since both of them are Malays and could easily communicate with each other in Malay.

[198] PW15 testified in his lengthy cross-examination by learned counsel for the accused as follows:

(a) it was PW7 who had informed him that the accused had asked him to pay RM200 in order to secure his release after his arrest;

(b) it was PW7 who had spoken to the accused to arrange for a RM600 package for the release of the three of them;

(c) it was PW7 who spoke to the accused on their behalf 'sebab S yang banyak bercakap dengan Sarjan Hassim';

(d) he had left the matter of the payment of a bribe to the accused to PW7 to sort it out with the accused;

(e) if PW7 did not tell him about the payment of the RM200 to the accused, he would not know;

(f) PW10 and PW14 had spoken to the accused in the accused's room for about two to two hours;

(g) he, PW7 and PW13 did not pay the RM200 to the accused and yet all three of them were released on police bail;

(h) it was PW14 who told him that she had arranged with the accused to release them upon payment of the RM200 for each of them; and

(i) after his release, he did not pay her the RM200 and she also did not ask him to pay her the RM200.

[199] This court was of the view that it was quite obvious that PW7 was trying his level best to distance himself from the accused in order to give the impression to the learned trial judge that he had nothing to do with the attempt by his brother (PW10), his ex-girlfriend (PW14), and also most probably by his friend (PW11) to bribe the accused in order to preserve his clean record as they knew that his ambition was to be a policeman.

[200] PW7 also testified as follows:

(a) PW11 informed him that he had phoned the accused;

(b) PW11 also informed the accused that he would either phone the accused again or meet up with the accused;

(c) PW7 then gave to PW11 the handphone number of the accused which he had obtained from PW14;

(d) the three of them, ie PW7, PW11 and PW14 then met up;

(e) a few days later, PW11 phoned him and informed him that the accused had been arrested by the ACA; and

(f) he also knew that the accused was arrested by the ACA because PW11 had told him that the accused had asked PW14 for RM 1000.00 to settle PW7's case.

[201] When PW7 was cross-examined by learned counsel for the accused he reiterated that PW11 had informed him that the accused had asked PW14 for RM1,000. This had occurred a few days after PW7 had met up with PW11.

[202] This court also noted that PW7 was not re-examined by the prosecution. The learned trial judge had overlooked this weakness in the prosecution case.

[203] This court also noted that PW11 did not testify that he had informed PW7 that the accused had asked PW14 for RM1,000 in order to settle PW7's case contrary to the testimony of PW7 to that effect. Hence, there was a strong possibility that either one or both of them were lying when they were in the witness box. This important point was not considered by the learned trial judge.

[204] There was also another point which was extremely significant to this court which was also, unfortunately, neither addressed nor appreciated by the learned trial judge who found the accused guilty as charged on the second count. It was the omission, intentional or unintentional, for reasons best known to PW7 and two learned DPPs, namely, Madam Wong Poi Yoke and YM Tengku Sarahani, by PW7 in his testimony to state, firstly, that he had informed PW11 two weeks prior to the lodging of the report (P4) by PW11 with the ACA that the accused had asked him (PW7) for a bribe of RM1,000 as a consideration for releasing him although his urine was tested positive for dangerous drugs.

[205] Secondly, as stated earlier when I was dealing with the salient aspects of the evidence of PW11, in his report (P4), PW11 had said that it was PW7 who had also told him that it was his girlfriend, PW14, who had paid RM700 to the accused in order to secure the release of PW7. It was also PW7 who had asked him to contact the accused and to enquire from the accused concerning the case against PW7.

[206] This court was of the view that the omission on the part of PW7 to testify as to those two matters was fatal to the prosecution's case against the accused on both the two counts.

[207] The reason is that it meant that the testimonies of PW11, PW14 and PW10 who testified that the two matters were told to them by PW7 constituted hearsay evidence and were clearly inadmissible. What is left is PW11's testimony that when he phoned the accused to ask him about PW7's case the accused had threatened to arrest him and PW7 if PW11 did not pay the accused the RM300.

[208] However, there was no corroboration of PW11's testimony on this fact-in-issue as this phone conversation between PW11 and the accused was not recorded and the taped recording of the phone conversation between PW11 and the accused on 10 May 2006 at 1.30pm was not a complete recording of the whole conversation between PW11 and the accused.

[209] Apart from that there was not the slightest mention made by PW11 or the accused anywhere in the taped recording that, firstly, the RM300 was

previously demanded or solicited by the accused from PW7, PW11, PW14 or PW10 as an inducement not to take action against PW7 and secondly, that the accused had threatened PW11 that he would arrest PW11 and PW7 if the RM300 was not paid by PW11 to the accused.

[210] This court also noted that the accused was upset with PW11 for having phoned him repeatedly to ask about the decision, presumably, whether to charge PW7 in connection with PW7's positive urine test results for dangerous drugs.

[211] He had told PW11 that he was working and that PW11's repeated phone calls to him had disturbed him in the carrying out of his work.

[212] Had the learned trial judge considered these important matters she would have found that the defence had succeeded in raising a doubt in the prosecution case in respect of the second count.

The prosecution's misplaced reliance on the alleged requests by the accused for money from PW7, PW10, PW11, and PW14 in order to prove the second count against the accused

[213] This court noted as follows.

[214] PW7 did not testify that the accused solicited a bribe, let alone a bribe of RM1,500 or RM1,000 or RM700, from him in order not to take action against him.

[215] PW10 testified that the accused solicited a bribe of RM1,500 from him for each of the three friends, that he bargained with the accused and that the accused reduced it to RM1,000 for each of the three friends.

[216] PW11 testified that he met up with PW7 in the latter's house. PW7 looked troubled and when he asked PW7 what was troubling him PW7 told him the accused had solicited a bribe of RM1,000 from him in the presence of PW14 at the police station after his arrest, that he had paid RM700 leaving a sum of RM300 unpaid and that he was scared because the accused had threatened to re-arrest him if he did not pay up.

[217] PW11 also testified that he phoned the accused to ask the accused what would happen to PW7 if PW7 did not pay the RM300 and the accused told him he would arrest him and also PW7.

[218] PW14 testified that while she and PW10 were at the police station

PW10 had asked the accused to reverse the positive result of PW7's urine test to a negative result and the accused had solicited a bribe of RM1,500 in order to do that. PW10 then bargained with the accused and the accused then reduced the amount of the bribe to RM1,000.

[219] Had the learned trial judge considered these material discrepancies in the testimonies of these four witnesses, she would have been satisfied that there was no credible evidence to establish a prima facie case against the accused on the two count and consequently, she would not have called the accused to enter his defence on the second count.

Three very important factors not given sufficient consideration by the learned trial judge — the failure of PW7 to promptly lodge a report against the accused for asking him to pay the RM300 after he was released, the inordinate delay on the part of PW11 in lodging the report (P4) against the accused and the failure of PW11 to give a good explanation for the delay on his part

[220] P4 which was the report which PW11 lodged with Puan Nik Asiah Nik Omar (PW3) of the ACA on 10 May 2006 at 11am states as follows in Malay:

> Lebih kurang (2) dua minggu lepas, saya telah di maklumkan oleh kawan saya Sarifudin bahawa Sarjan Hashim daripada Balai Dang Wangi telah meminta wang rasuah RM 1000.00 daripadanya sebagai balasan dia dibebaskan kerana ditahan selepas didapati positif ujian air kencing. Menurut Sarifudin, teman wanitanya iaitu Jaja telah membayar RM 7000.00 kepada Sarjan Hashim supaya Sarifudin dilepaskan. Sarifudin telah meminta saya menghubungi Sarjan Hashim bertanyakan mengenai kesnya itu. Pada 9 May 2006 jam lebih kurang 8.30 malam, saya telah menghubungi Sarjan Hashim untuk bertanyakan kes Sarifudin tersebut. Sarjan Hashim telah meminta saya membayar wang rasuah RM 300.00 iaitu baki dari RM 1000.00 seperti yang dimintanya daripada Sarifudin untuk menyelesaikan kes Sarifudin. Sekiranya wang tersebut tidak bayar, Sarjan Hashim akan bertindak untuk menangkap saya dan Sarifudin. Inilah aduan saya.

[221] This court noted that if it was indeed true that the accused had solicited the bribe from PW7 two weeks earlier, it was incumbent on PW7 to promptly lodge a report against the accused but he did not do it. He also failed to give any reason why he did not lodge the report himself and why PW11 had to lodge it.

[222] PW11 also did not give any reason why it took him two weeks to lodge the report against the accused. He had also testified that one of the reasons why he was afraid of the accused was that he frequented the night club and that the police would find fault with and arrest the patrons including him if they had no

other work to do. Hence, he had an ulterior motive for lodging the report quite apart from what he had alleged was told to him by PW7.

[223] As stated earlier, neither PW10 nor PW14 lodged any report against the accused for having solicited the alleged bribe of initially RM1,500 which was allegedly then reduced to RM1,000. Both of them also did not explain their failure to do so.

[224] Therefore, the credibility of PW7, PW10, PW11 and PW14 was in serious doubt and the learned trial judge ought to have considered whether this had raised a serious doubt in the prosecution case that they had concocted their allegations against the accused to punish the accused for detaining PW7 and his two friends at the night club after having tested their urine samples at the night club which, unfortunately, for the three friends turned out to be positive for dangerous drugs but, fortunately, for PW7 was tested negative by the hospital.

The laying of the trap for the accused by the ACA in respect of the alleged receipt of the marked notes by the accused as specified in the second count

[225] According to PW11 after PW8 had recorded the telephone conversation between him and the accused, PW11 received RM300 in cash in marked notes (the 'marked money') from PW3 form. He signed on a form (P5) in acknowledgement of his receipt of the marked notes.

[226] He identified P6 a–f as the marked notes which he had received from PW3.

[227] He also identified P5 as the form which he had signed. He further identified his signature in P5.

[228] PW11's testimony on this fact-in-issue was corroborated by the testimony of PW3. PW11 was instructed to go to the meeting place and hand over the marked notes to the accused.

[229] As stated earlier upon doing that he was instructed to send a very definite pre-arranged signal to inform the ACA officers stationed at the meeting place to notify them that he had handed over the marked notes to the accused to enable them to promptly move in and arrest the accused while the marked notes were still in his physical possession. The pre-arranged signal was the tucking of his shirt inside his trousers.

[230] PW11 took the marked money and placed it in his right trousers'

pocket. He then proceeded to the meeting-place.

PW11's allegation that he gave the pre-arranged signal for the arrest of the accused after he had handed over the marked notes to the accused but none of the ACA officers saw him giving the pre-arranged signal for the arrest of the accused

[231] As stated earlier, while he was on his way to the meeting-place PW11 received a call from the accused asking him to hurry up.

[232] He told the accused he was already on his way. He arrived at the meeting place before the accused did.

[233] Both he and the accused then walked towards a table which was situated near the television inside the restaurant. Both of them then sat down facing each other at the table. They spoke for a while. The accused then got up and went to the counter to make payment.

[234] After that both of them left the restaurant. The accused was on the right side of PW11.

[235] As both of them were walking, the accused whispered to him and asked him about the money. PW11 then took out the marked notes from his right trousers' pocket and handed them over to the accused on his left. The accused took the marked notes in his left hand.

[236] PW11 then told the accused he was leaving. PW11 then gave the pre-arranged signal to the ACA officers to notify them that he had handed over the marked notes to the accused by putting both his hands inside his pockets.

[237] The court noted that there was a material contradiction between PW11's testimony and the testimonies of the ACA officers who took part in the briefing and ambush concerning the pre-arranged signal. Furthermore, the prosecution did not ask PW11 to explain why he had chosen to give a different pre-arranged signal from the one that he had been instructed to give by the ACA officer during the briefing at the office of the ACA ie by tucking his shirt inside his trousers.

[238] At that juncture, according to PW11, he was approaching near the motorcycle. Nevertheless, he could see the ACA officers detaining the accused. He also saw the accused throwing away the RM300.

[239] PW11 then took a taxi to the office of the ACA.

[240] But the learned trial judge did not consider seriously the very important fact-in-issue that none of the ACA officers testified that they saw PW11 tucking his shirt inside his trousers. Had she done that she would have proceeded to draw an irresistible inference that PW11 did not in fact hand over the marked notes to the accused. She would then have considered the question as to who was the one who could have possibly threw or dropped the marked notes which were, subsequently, found at the spot which was shown to PW3 by PW2.

[241] She would have found that there were two possibilities. The first possibility was that PW11 could have done it in order to frame the accused. He had testified that he saw the accused throwing away the RM300 while he was approaching PW2's motorcycle which he had used to go to the meeting place to meet the accused.

[242] He did not explain how he was able to see the accused doing that when none of the ACA officers who were present during the ambush saw it except for PW2.

[243] The other possibility is that one of the ACA officers could have dropped or thrown the marked notes in order to render the trap a success.

[244] That officer could have been PW2. PW2 could have obtained the marked notes from PW11 upon meeting PW11 at the place set aside for the parking of motorcycles after he realised that PW11 did not give the pre-arranged signal to the ambush party. After having done that PW2 could have quickly and surreptitiously dropped or threw them on the road to give the impression that the accused was the one who had dropped or thrown them on the road in order to avoid detection and arrest.

[245] The reasons are that it was possible that PW2 was so convinced in his own mind that the accused was guilty based on what PW11 had alleged in his report P4 and the contents of the taped recording of the phone conversation between PW11 and the accused.

[246] He was also the one who had informed his superior officer about PW11's report, his superior officer had directed the trap to be laid to catch the accused with the marked notes of RM300 on him, a lot of time, effort and expense had been put in by the ACA in order to trap the accused, it would be very embarrassing for him if PW11 had deceived him resulting in the trap being unsuccessful and he was, therefore, very determined to make the trap a success.

The arrest of the accused by PW1 and the recovery of the marked notes by PW3 from the road in front of the meeting place upon being instructed to do so by PW2

[247] According to PW1, he together with eight other ACA officers and PW11 attended a briefing by Tuan Hj Zubir, the Deputy Head of the ACA of the Federal Territory of Kuala Lumpur on 10 May 2006 at about 12.50pm.

[248] The briefing concerned the setting up of a trap at 2.30pm at a restaurant, namely, the Putra Restaurant (the 'meeting place'), to arrest the accused in connection with P4 which was lodged by PW11. It was alleged in P4 that the accused had asked PW11 for a bribe of RM300 in order to release PW7 whose urine was tested positive for drugs.

[249] It was also alleged by PW11 in P4 that PW14 had already paid RM700 to the accused in respect of the same matter.

[250] In the briefing, PW11 was instructed to give to the ambush party a pre-arranged signal for the arrest of the accused by tucking his shirt into his trousers after he had handed over the marked notes to the accused.

[251] After the briefing, PW1 proceeded to the shopping complex called The Mall in his car together with two other ACA officers, namely, Encik Ali Akhbar and Encik Mohd Yahya. Upon arriving at The Mall he parked his car in the car park.

[252] The three of them then crossed the road and walked towards the meeting place. Upon entering the meeting place he sat down at one of the tables where another ACA officer, namely, Tuan Ramlan bin Ahmad (PW5) was already seated.

[253] PW11 saw that the accused and PW11 were already seated behind him at another table which was situated near the television. PW1 had to look behind him in order to observe the movements of the accused.

[254] PW1 also saw that the other members of the ambush party were also seated at their respective tables in the restaurant.

[255] Later he saw the accused approaching the cashier's counter to make payment and then walking out of the restaurant together with PW11. He then walked out of the restaurant towards a sundry shop which was situated in front of the restaurant. He saw that the other ACA officers were also walking out of the restaurant.

[256] At this juncture he saw Tuan Mohamad Tarmize bin Abdul Manaf (PW2) touching the hand of the accused in the form of a greeting. A

[257] PW1 then walked by the left side of the sundry shop and out of the sundry shop towards the road. B

[258] At this juncture he saw the accused running towards him. The accused collided into him. This caused him to lose his balance and he nearly fell down. He was able to stop himself from falling down but not his spectacles which fell onto the floor. C

[259] He did not notice the whereabouts of PW11 at that point in time. He turned around to look at the accused. He saw that another ACA officer by the name of Izzat had both his arms firmly and tightly around the accused. The accused was struggling with Izzat in order to free him self. D

[260] PW1 introduced himself to the accused as an ACA officer but the accused continued to struggle with Izzat.

[261] PW1 and Izzat then detained the accused together with the assistance of Tuan Ramlan bin Ahmad (PW5). When PW1 wished to cuff the hands of the accused, the accused continued to struggle with him and refused to allow his hands to be cuffed by PW1. E

[262] Nevertheless, PW1 and PW5 managed to cuff the accused's hands. PW1 then took the accused to the side of a car which was parked nearby. PW1 then issued a notice of arrest (P2) to the accused. He read out the notice to the accused. He also informed the accused that he was arresting him under s 11(a) of the Act for the offence of accepting a bribe. F G

[263] PW1 and the accused then signed on the notice of arrest. After PW1 had served it on the accused PW1 asked the accused to produce his authority card in order to fill in his particulars and PW1 then left it on the car.

[264] Suddenly, the accused lost his temper with PW1. He told PW1 that he was badly brought up. He also told PW1 to remove the handcuffs. He then challenged PW1 to a fight. However, PW1 ignored the accused's request. H

[265] PW1 then handed the accused over to PW5 to enable the accused to compare the serial numbers of the notes which were recovered by PW3 with the serial numbers of the marked notes. I

[266] It is very pertinent that PW1 testified that he did not know from where

PW3 had recovered the notes. It is also very pertinent that PW1 did not see the accused throwing the notes or something when he first set eyes on the accused running towards and colliding into him and when he saw the accused struggling with Izzat.

[267] PW5 made the comparison but the accused refused to sign on the list of the serial numbers of the notes which were recovered by PW3.

[268] At this juncture it began to rain. So the ACA officers took the accused back to their office.

[269] When PW1 was cross-examined by the accused's learned counsel he agreed with his suggestion that the ACA did not investigate whether the contents of P4 were true before laying the trap to arrest the accused. He also agreed with his suggestion that during the briefing he and the others were not told that PW7's and PW14's statements had been recorded in order to confirm the truth of the contents of P4. He also agreed with his suggestion that the trap was laid purely based on what was said by PW11 in his report (P4).

[270] Nevertheless, PW1 disagreed with his suggestion that PW11's allegation in his report that the accused had asked for a bribe of RM300 was purely PW11's concoction.

[271] In his re-examination, PW1 explained that after a report is lodged with the ACA the practice of the ACA is to lay a trap first and only after the trap has been laid will investigations be conducted by the ACA to verify whether the contents of the report are true. PW1 also maintained what he said in his examination-in-chief that he had introduced himself as an ACA officer to the accused before he arrested the accused.

[272] PW2 testified that he was the one who briefed Tuan Abu Zubir, the deputy head of the ACA in Kuala Lumpur, about the report (P4) which was lodged by PW11 against the accused.

[273] Tuan Abu Zubir Mahfuz then directed that a trap be laid to arrest the accused. He gathered together the ten ACA officers and briefed them as to the contents of PW11's report and their respective roles in the trap.

[274] He also informed the ACA officers that a recording of the phone conversation between PW11 and the accused would be made after the briefing in order to determine the place of their meeting.

[275] After the briefing PW2 instructed PW8 to make a taped recording of the phone conversation between PW11 and the accused. A

[276] PW2 then went to the meeting place. He sat at a table which was situated behind the accused. He could see PW11 and the accused having a conversation but he could not hear what was being said by the two of them. B

[277] He felt that his location was unsuitable and in order to avoid his presence being detected by the accused he then walked out of the restaurant and stood in front of a book stall which was situated by the side of the restaurant. C

[278] Subsequently, he saw the accused and PW11 walking out of the restaurant. Both of them were headed in different directions. He did not see PW11 giving the pre-arranged signal for effecting arrest on the accused. D

[279] He saw the accused walking towards the main road. As the accused was about to cross the main road, he decided to detain the accused. He approached the accused and greeted the accused. The accused acknowledged his greeting. He then touched the right hand of the accused. He saw that the left hand of the accused was clenched as though it was holding something. E

[280] The accused asked him 'siapa ni?' in Malay which means 'who is this?' in English. In his examination-in-chief, he said he kept silent. F

[281] He also said that at that juncture he saw PW8 on stand by across the road. He also heard PW8 saying in Malay to the accused 'saya daripada BPR' which means 'I am from the ACA' in English. G

[282] When the accused heard those words the accused quickly let go of PW2's hand and pushed PW2 towards the front. PW2 then tried to catch hold of the accused but the accused put up both his clenched fists as if he was going to punch PW2. H

[283] This court noted that at this juncture in his testimony PW2 did not state that he saw something sticking out from the left clenched fist of the accused. I

[284] The accused then tried to run across the road but he was prevented from doing so by another ACA officer. The accused then ran back towards the restaurant but he collided into PW1.

A **[285]** At this juncture PW2 saw money falling from the accused. PW2 instructed PW8 to take photographs of the money scattered on the road.

[286] Izzat then grabbed hold of the accused but the accused struggled with him in order to free him self. Then PW2 saw some five or six ACA officers detaining the accused. However, the accused continued to struggle with them and PW2 asked them to release the accused.

[287] While PW8 was photographing the money on the road, PW2 met PW11 at the place reserved for the parking of motorcycles in front of the restaurant. PW11 told PW2 that he had handed over the money to the accused while both of them were walking out of the restaurant.

[288] PW2 then instructed PW3 to gather up the money and to hand the money over to PW5. His instruction was carried out by PW5.

[289] He then instructed PW5 to compare the serial numbers of the gathered notes with those of the marked notes. His instruction was carried out by PW5.

[290] PW5 found that the two sets of serial numbers matched each other.

[291] In his cross-examination PW2 said when the accused passed by him he was pretending that he was reading the newspaper directly in front of the book stall. He explained that the accused was standing by the side of the road when he greeted the accused and the accused acknowledged his greeting.

[292] This court noted that when PW2 was cross-examined by the accused's learned counsel he said he kept silent for a moment but he also added that he then he told the accused 'BPR' in Malay which means 'ACA' in English. He also testified that that he had wanted to ask the accused to give his co-operation by following him and his men but he had no opportunity to do so as the accused pushed him away and tried to escape by running away from him.

[293] It was also suggested to PW2 by learned counsel that PW2's conduct in covering his face with newspaper when he greeted the accused and touched the hand of the accused had caused alarm to the accused which triggered off the reaction of the accused. However, PW2 did not agree with the suggestion.

[294] It was also suggested to PW2 that PW11 did not at any point in time hand over the marked notes to the accused because PW11 did not at any point in time give the pre-arranged signal to the ambush party to arrest the accused. But PW2 did not agree with that suggestion.

[295] PW2 also said that when he saw the notes lying scattered near each other on the road the notes were not folded. A

[296] This court noted that PW2 had said in his examination-in-chief that he saw that the left hand of the accused was clenched when he touched the hand of the accused after he had greeted the accused. By testifying in this manner he seemed to imply that the accused must have been holding the marked notes in his clenched left hand. B

[297] If what PW2 said was true the notes would have been crumpled when they fell onto the road and when they were retrieved from the road by PW3. But the photographs of the fallen notes at pp 435–437 of the appeal record did not corroborate PW2's testimony on this very important fact-in-issue. C

[298] This court also noted that the testimony of PW2 in his examination-in-chief, that when PW8 was photographing the notes on the road he met PW11 at the place reserved for the parking of motorcycles in front of the restaurant and PW11 told him that he had handed over the marked notes to the accused, constituted hearsay evidence and was in admissible because PW11 did not testify to that effect. D E

[299] This court was of the view that had the learned trial judge considered this important point she would have considered the strong possibility that PW2 had concocted the evidence in order to bolster the case for the prosecution since none of the ACA officers saw PW11 giving the pre-arranged signal to the ACA's ambush party. F

[300] PW3 testified that she was the ACA officer who had handed over the marked notes to PW11 before she went to the meeting place with the rest of the ACA officers. G

[301] She testified, inter alia, in her examination-in-chief, that while she was sitting in the restaurant at the same table as another ACA officer, namely, Puan Umi Kalsom bt Ahmad (PW4) she saw the accused walking past by behind her. She explained that PW4 was seated facing the table at which the accused and PW11 were seated while she was seated with her back to the table at which the accused was seated. H

I

[302] She then saw the accused walking alone towards the main road and she also saw PW11 walking in another direction. After that she saw the accused running back from the direction of the main road. She then saw PW1 and Izzat attempting to detain the accused.

[303] She saw that the accused was struggling with them. She then saw the accused being detained by PW5, PW1 and Izzat. They cuffed his hands.

[304] She was then called by PW2 who was standing in the lane in front of the book stall. PW2 pointed out to her some RM50 notes lying on the road. PW2 then instructed PW8 to photograph the notes on the road.

[305] PW2 then instructed her to pick up the notes from the road. She picked them up and handed them over to PW5 for the latter to make a comparison of the serial numbers of the notes which she gathered from the road and those of the marked notes.

[306] PW5 found that there were six notes. PW5 also found that the serial numbers of the two sets of notes matched each other.

[307] PW3 then returned to her office at the ACA.

[308] In her cross-examination, her testimony was unshaken. She maintained that it was PW2 who pointed out to her the presence of the notes lying on the road. She added that PW2 was standing near to where the notes were lying on the ground. She saw that the notes were loosely folded and were scattered on the road. She could not remember how many notes there were altogether.

[309] She saw PW8 taking photographs of the notes as they lay on the road.

[310] She also agreed with the suggestion of learned counsel for the accused that had PW2 not pointed out to her the notes as they lay on the road she would not have seen them lying on the road.

[311] Therefore, it is clear that only PW2 knew the location of the marked notes on the road. Hence, an irresistible inference could be drawn that he could have thrown them there.

[312] The oral testimony of PW4 corroborated the oral testimony of PW3. She testified that from where she was seated she could see the accused and PW11 clearly as she was seated directly facing their table.

[313] She also testified that she was seated facing the accused. So she could see what he was doing. Her attention was also focused on the accused. She was able to give an accurate description of the accused. She also identified the accused in court.

[314] She categorically said that she saw the accused conversing with PW11. She categorically said she did not see any thing being handed over by PW11 to the accused as both of them were seated at their table. She was positive that there was no handing over of the marked notes by PW11 to the accused in the restaurant.

[315] About five to eight minutes later she saw the accused and PW11 getting up from their seats at the table. She then saw the accused making payment at the counter. She then saw him walking out of the restaurant.

[316] A short while later she saw the accused being detained. There was a commotion during his detention as he did not co-operate with the ACA officers.

[317] She then returned to her office where she was directed by Tuan Abu Zubir Mahfuz to lead a team of three other ACA officers including PW5 to raid the home of the accused to search for other evidence against the accused. She also brought the accused along with her.

[318] However, although she did seize some items, her mission turned out to be unsuccessful as she did not find other evidence against the accused. She then returned to her office together with the accused and her team members.

[319] Her testimony was unshaken during her cross-examination.

[320] She added that she could not hear the conversation between the accused and PW11 while she was observing them as they were seated at their table inside the restaurant. She walked out of the restaurant about 5–6 minutes after the accused had walked out of the restaurant upon hearing the commotion which came from outside the restaurant.

[321] She explained that the purpose of conducting the raid at the home of the accused soon after the trap was carried out at the meeting place was to gather evidence, such as his savings account book, in order to ascertain whether the accused was taking bribes habitually and to find out the nature of his lifestyle, presumably, whether he was living a lavish lifestyle.

[322] She disagreed with the suggestion of learned counsel for the accused that the raid was conducted in order to find other evidence to charge the accused as the trap was unsuccessful. She, nevertheless, agreed with the suggestion of learned counsel for the accused that it was not compulsory to conduct the raid in every case and it would depend on the circumstances of each case.

[323] PW5 testified that he was also a member of the ambush party. He was seated at a table about four to five tables away from the table at which the accused and PW11 were seated. He observed the accused and PW11. He also testified that he did not see PW11 handing over anything to the accused inside the restaurant.

[324] He then saw both of them walking side by side out of the restaurant. He followed the accused and PW11 out of the restaurant. He did not see PW11 handing over anything to the accused.

[325] While he was outside the restaurant he saw PW11 walking to the place where the motorcycles were being parked. He saw the accused walking near to PW2 who was at the place where the motorcycles were being parked.

[326] He then saw the accused turning back and running towards him, PW1 and Ali. When the accused reached the three of them a slight struggle ensued between them and the accused which caused all of them to fall down including the accused. They then detained and arrested the accused. They also cuffed his hands.

[327] The accused then engaged in a quarrel with PW1. He demanded that PW1 remove the cuffs from his hands.

[328] PW5 then seized the notes which PW3 had gathered but he did not know from where PW3 had gathered them. He was told that the accused had thrown the notes. He did not testify as to who had given him the information.

[329] PW5 then wrote down the serial numbers of the notes in the seizure list. He compared them with the serial numbers of the marked notes and he found that they matched. Hence it was confirmed that the seized notes were the marked notes.

[330] He then asked the accused to sign on the seizure list (P8) but the accused refused to do so.

[331] PW5 then handed over the seized notes to PW2. PW5 then took part in the raid conducted by PW4 on the home of the accused. They seized a few documents from the home of the accused.

[332] PW5's testimony was unshaken during his cross-examination. He said that when the accused walked out of the restaurant together with PW11 he followed them from behind at a distance of about 4–5 meters.

[333] He could not hear the conversation between the accused and PW11 while they were inside the restaurant.

[334] He said that PW3 told him that the accused had thrown the notes. He disagreed with the suggestions of learned counsel for the accused that the accused did not throw the notes and that the accused did not know about the notes which were thrown on the road.

[335] He said that the raid was conducted on the home of the accused in order to look for documents relating to the past payment, presumably, of the RM700, to the accused, presumably, as had been alleged by PW11 against the accused in PW11's report (P4) to the ACA.

[336] He said when PW3 handed over the notes to him they were folded.

[337] PW5 disagreed with the suggestion of learned counsel for the accused that the accused had been framed up by PW11 in the instant case.

Confirmation by DSP Ding Teow Hing (PW6) that the accused was a police officer holding the rank of sergeant at the material time

[338] PW6 testified that at the material time he was the Head of the Narcotics Division in the Dang Wangi Police District headquarters, that the accused was his subordinate, that the accused was holding the rank of sergeant and that the accused was also the AIO at the material time.

[339] The accused had joined the Royal Malaysian Police Force in 1989.

[340] PW6 confirmed that at the material time he had led a police raid on the night club together with about 20 of his men and that 20 out of the 200 patrons at the night club were detained after their urine were tested positive for dangerous drugs.

[341] The 20 persons included PW7 who was detained as he was suspected of having committed an offence under s 15(1)(a) of the DDA ie self administration of a drug. The offence was a bailable offence and PW7 was released on police bail of RM2,000 with a surety by Insp Nordin bin Ibrahim (DW3) but without any security in the form of money being paid by his surety.

[342] PW7 was not charged because the urine test report from the hospital stated that PW7's urine did not contain any dangerous drug ('negative'). PW6 did not explain why or how the urine test report from the hospital could have stated that PW7's urine was negative when the test which was conducted by the

police on PW7's urine during the police raid showed that it was positive. PW6 also did not testify that the only reason that could have happened was that the accused had switched PW7's urine sample with some one else's.

[343] It is very significant that in his cross-examination, PW6 testified that the accused had followed the correct procedure in PW7's case.

[344] PW6 also testified that the accused as the AIO had no power to release PW7 on bail without security except with the approval of the SIO and, additionally, with his approval. The accused also had no power to charge PW7 without the approval of a senior police officer, namely, ASP Akmal, the senior investigating officer (the 'SIO').

[345] PW6 also testified that since the urine test report from the hospital stated that PW7's urine did not contain any dangerous drug PW7 could not be charged and that the IP relating to PW7's case was classified as NFA by the SIO which means no further action.

[346] PW6 further testified that the SIO could NFA PW7's case without getting his prior approval.

[347] PW6 was not re-examined by the prosecution. The learned trial judge had failed to appreciate that PW6's evidence was unshaken and that it was consistent with the innocence of the accused.

THE DEFENCE OF THE ACCUSED

[348] The accused opted to make his defence by giving evidence on oath as DW1, the first defence witness. He also called his wife, namely, Siti Rohana bt Zainal, as his second witness (DW2) and Insp Nordin bin Ibrahim as his third witness (DW3).

[349] He testified that he had six children some of whom were working while the others were studying in the university. His wife owned a bus permit in the year he was charged with the two counts ie 2006. Since he only received a salary of RM1,–000 a month as a sergeant he would assist his wife to drive her school bus after his office hours.

[350] On the day in question he was driving his wife's school bus. Inside the school bus were many school children. He was sending them to their homes after school.

[351] He had received a phone call from a person (PW11) who had

identified him self to the accused on the phone as Farid. He could not hear Farid clearly when the latter spoke to him as the school children were talking inside the bus and there was the noise from the traffic outside as the windows of the school bus were wound down. He was also driving the bus with one hand and sometimes with two hands while holding the mobile phone in one hand and speaking into the mobile phone now and then.

[352] Prior to that phone call Farid had called him several times to invite the accused to meet up with him to discuss about PW7's case.

[353] He did not know Farid but he could recognise PW11's voice as the voice of Farid. Farid told him he wished to meet up with the accused in order to surrender the bail bond receipts of PW7 and his two friends to the accused.

[354] He explained that the word 'tiga' in Malay which he had used in the taped phone conversation referred to the three bail bond receipts of the three friends. Farid wished to help his three friends by surrendering the three bail bond receipts as PW7 and his two friends did not wish to go to the police station to surrender them.

[355] He agreed to meet up with Farid at the restaurant. However, when Farid met up with him at the restaurant Farid told him he did not bring along the three receipts. Farid then asked him to order some food which he did. He also had a short conversation with Farid. He then went to the counter to pay for the food.

[356] After he walked out of the restaurant he asked Farid to surrender the three bail bond receipts to him in his office at the police station. He walked towards the main road. Farid left in another direction.

[357] As he was crossing the road he saw several persons in plain clothes rushing towards him. He became afraid because he was not armed. He then turned back and ran towards the restaurant in order to seek assistance. However, he was arrested by some other persons in the restaurant. They only identified themselves as ACA officers to him after they had arrested him.

[358] He explained that he thought that the several persons who rushed towards him were criminals and he felt that his safety was under threat. He explained that he felt that way because as the AIO in the narcotics division he was exposed to criminals when he was carrying investigations into drug cases.

[359] However, he was arrested by some other persons in the restaurant after he had fallen down. Before he was arrested he managed to get up on his feet but

he was held firmly by a Malay man who stepped on his feet. The Malay man then took out some notes which were neatly folded and also a white coloured form. He was asked to sign on the form but he refused. He identified the Malay man as PW5.

[360] He said he told PW5 he did not know from where PW5 had suddenly produced the notes but PW5 said that he had recovered the notes from the accused's body. He told PW5 he did not wish to sign the form because he did not know from where PW5 had recovered the notes.

[361] He denied that Farid had handed over the notes to him as they were walking out of the restaurant. He also denied that he had thrown the notes while he was running back towards the restaurant.

[362] He maintained that the possibility of being framed up by Farid and others was a real possibility because of his occupation as a police officer in charge of the enforcement of the law against drug offenders.

[363] In his cross-examination, his testimony was unshaken. He denied that he had asked for RM300 in order to reverse the urine test results of PW7 from positive to negative. He denied that he was able to do it because he was the AIO.

[364] He denied that he had concocted his story that the purpose of his meeting with PW11 at the restaurant was to collect the three bail bond receipts from PW11 and that the true story was that he had gone to meet PW11 in order to collect the bribe of RM300. He denied that the word 'tiga' referred to the RM300 and not to the three bail bond receipts.

[365] He also denied that he had collected the RM300 in marked notes from PW11 after both of them had come out of the restaurant. He also denied that PW2 had approached him and had introduced him self to the accused as an ACA officer. He also denied that this had caused him to run back towards the restaurant and that as he ran he had thrown the RM300 which had fallen onto the road because he knew that it was a bribe.

[366] He also denied that he had struggled with PW1 and PW5 in order to avoid being arrested by them because he knew that he had accepted a bribe of RM300 from PW11. He also denied that he had refused to sign the form because he knew that he had accepted a bribe of RM300 from PW11.

[367] He disagreed that he had switched the urine sample of PW7 before it

was sent to the Kuala Lumpur Hospital for analysis and that this had caused the urine test report of PW7 to be negative and that the RM300 was to pay him for having carried out the switch.

[368] He also disagreed that the purpose of his going to the meeting place was to collect the RM300 from PW11.

[369] In his re-examination, he explained that in his cross-examination he had testified that he could not remember and/or he was not sure when he was asked by the learned DPP as to what was said by PW7 to him at the material time and whether he had said certain things to PW7 at the material time because the events mentioned in the questions had taken place a long time ago. He also denied that he had asked for RM1000 in order to settle PW7's case.

[370] He also explained that the test strip which was used by the police to test the urine of PW7 was sent to the Kuala Lumpur Hospital for testing. It was for them to verify the test strip. He could not explain why the report of the Kuala Lumpur Hospital had showed that the urine test result of PW7 was negative.

[371] This court was of the view that the burden was on the prosecution to call the medical officer who certified that the urine test report of PW7 was negative and also the superior officer of the accused to explain that the only reason why it could have happened that way was because the urine sample of PW7 was switched by the accused as the burden was on the prosecution to prove the guilt of the accused and the accused had no burden to prove his innocence.

[372] Similarly, the onus was on the prosecution to prove on a prima facie case at the close of the prosecution case and beyond reasonable doubt at the close of the defence case that the accused did in fact receive with his left hand the marked notes corruptly from PW11 as a bribe in order not to take action against PW7 and upon being approached by PW2 who had informed the accused that he (PW2) was an ACA officer the accused had immediately thrown the marked notes as he ran away from PW2 in order to avoid the recovery of the marked notes from his physical possession by the ACA officers.

[373] The prosecution ought to have sent the marked notes to the fingerprint expert and/or the chemist to be analysed in order to detect the presence of the fingerprint and/or the DNA profile of the accused on the six pieces of RM50 notes which the prosecution witness, PW5, said were in fact the marked notes and which PW2 said PW11 had told him that he (PW11) had handed over to the accused after the accused and PW11 had walked out of the restaurant.

[374] The conduct of the accused in running away and his aggressive conduct in resisting arrest gave rise to two possibilities. One is that he had a guilty mind because he had done something wrong. The other is that he believed he was innocent for the reasons given by him at pp 256–257 of Vol 1 of the appeal record and which have been mentioned above and that he had reacted in that manner out of a strong feeling of fear for his personal safety because the ACA officers did not identify themselves to him when they confronted him and attempted to arrest him.

[375] So his reaction when viewed in that perspective was a normal reaction and was not due to a guilty mind. By virtue of the reasons given by the accused and the weaknesses in the prosecution case this court could not rule out the second possibility. Hence the benefit of the doubt ought to have been given to him.

[376] If it was true what was alleged by PW11 that the accused had asked for the RM300 and the meeting between him and the accused at the restaurant was solely for the purpose of the handing over by PW11 of the RM300 to the accused the accused would surely have been very pleased to speak to PW11 on the phone. But the taped recording of the phone conversation showed otherwise. It showed that the accused was annoyed with PW11.

[377] It also gave rise to a strong possibility that half of the time the accused could not, in fact, hear what PW11 was saying as the accused would reply with the word 'Hah' in many parts of the transcript after the words allegedly said by PW11 in reference to the payment of the RM300 by PW11 to the accused. This is corroborated by the accused's sworn oral testimony that he had replied in that manner as he could not hear what was said by PW11 due to the noise inside the bus and outside the bus at the material time.

[378] At p 440 items 85–90 of Vol 2 of the appeal record, the transcript of the taped recording showed that the accused had said 'kau telefon, telefon, telefon ganggu aku punya kerja tau tak?' in Malay which mean 'you telephone, telephone, telephone, do you not know that you are disturbing me in my work?' in English. This is corroborated by his sworn oral testimony that PW11 would call him often and disturb him while he was working.

[379] The learned trial judge also erred when she relied on the words 'tiga — maknanya semua sekali seribulah' in Malay which mean 'three — so it means altogether 1000.00' in English which appear at p 438 of Vol 2 of the appeal record to conclude that there was sufficient evidence that the accused had solicited a sum of RM1,000 and had agreed to receive the balance sum of RM300 from PW11 at the meeting place at 2.30pm.

[380] The reason is because these words were uttered by PW11 and not by the accused. Had the learned trial judge considered that there was a strong possibility that the accused could not hear what was being said by PW11 she would not have arrived at that conclusion.

[381] There is another very important issue. It is the undisputed fact that a team of ACA officers led by PW4 had unsuccessfully raided the home of the accused immediately after the arrest of the accused and the recovery of the marked notes not from the person of the accused but on the road gave rise to a strong possibility that the raid which was ordered by Tuan Abu Zubir Mahfuz was a desperate attempt which was undertaken in order to supplement and bolster up a botched trap.

[382] This court was of the view that Tuan Abu Zubir Mahfuz was a material witness. Yet he was not called as a witness by the prosecution in order to explain and justify his decisions and directions.

[383] There was, therefore, no opportunity for him to convince the learned trial judge that the raid on the home of the accused immediately after the outcome of the trap was not done solely for the purpose of bolstering a weak case against the accused. Hence there was a material gap in the prosecution case which gave rise to a serious doubt which ought to be resolved in favour of the accused.

[384] Had the learned trial judge considered the numerous weaknesses in the prosecution case as mentioned above which she had the first and best advantage of detecting as she could observe the demeanour of the prosecution witnesses while they were testifying before her she would not have ordered the accused to make his defence to the second count of corruption.

[385] Having erroneously called for the defence of the accused, the learned trial judge ought to have held that the prosecution had failed to prove the second count of corruption against the accused as the accused had succeeded in raising a doubt in the prosecution case that he had corruptly agreed to receive and did receive the RM300 as a bribe in order not to take action against PW7 based on the reasons as enumerated above.

[386] The learned trial judge had a duty to evaluate and consider the totality of the case for the defence and the prosecution at the conclusion of the full trial before concluding that the prosecution had proved its case against the accused on the two count beyond reasonable doubt and to give sufficient reasons for her conclusion (see *Soosay Dass v Public Prosecutor* [1951] MLJ 57 and *Public Prosecutor v Koh Chee Meng* [1991] 3 CLJ 58).

[387] The failure of the learned trial judge to consider the evidence of the prosecution witnesses in the light of the defence is serious and has led to a miscarriage of justice in the instant case (see *Abdullah bin Yaacob v Public Prosecutor* [1991] 2 MLJ 237).

[388] This court was of the view that the rebuttable presumption contained in s 42 of the Act that the accused had corruptly obtained the RM300 from PW11 was not triggered off based on the following reasons:

(a) Firstly, the RM300 was not recovered from the body of the accused by any of the ACA officers but was found on the road by PW3 who did not see the accused holding it or throwing it.

(b) Secondly, it was extremely doubtful what PW11 said about handing over the RM300 to the accused as they were walking out of the restaurant as PW11 did not give the pre-arranged signal. Furthermore, PW3–PW4 said they did not see PW11 handing over anything to the accused let alone the marked notes even though the place which was marked by PW11 on the sketch plan as the spot where he had handed over the marked notes was close by the table at which both the witnesses were seated.

(c) Thirdly, it was also extremely doubtful what PW11 said about seeing the accused throwing the RM300 while PW11 was at the place reserved for the parking of motorcycles as he did not give any details as to how the accused threw it for eg whether the accused threw it from his hand or the accused took it out from his pocket and then threw it.

(d) Fourthly, it was also extremely doubtful what PW2 said about seeing the accused walking by past him with a left clenched fist as if he was holding something inside his fist and about seeing notes falling from the accused as the accused was struggling with the ACA officers as the notes did not appear to be crumpled up or closely folded up so as to fit inside the left clenched fist of the accused.

[389] Hence the prosecution could not rely on that section in order to presume that the accused had corruptly obtained the RM300 from PW11 unless he could prove otherwise to the contrary.

[390] The facts of the instant case are clearly distinguishable from those in the case of *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401. In that case the ACA officers saw the accused throwing the marked notes onto the floor and they saw the accused stepping on the marked notes with his foot when they entered the room of the accused after the key prosecution witness had handed over the marked notes to the accused and had then alerted the ACA officers who were waiting in ambush outside the accused's room.

[391] This court was of the view that had the learned trial judge not misdirected herself she would have found that the accused had, in his defence, given an explanation which was consistent with his innocence with regard to the second count and she would have recorded an order of acquittal against him on the second count.

CONCLUSION

[392] In view of the reasons as set out above and as both the two counts of corruption are so closely intertwined one with the other and since the credibility of the key prosecution witnesses was in serious doubt in relation to both the two counts of corruption preferred against the accused this court was satisfied that the public prosecutor's appeal had no merit and ought to be dismissed while the appeal of the accused had merits and ought to be allowed.

[393] This court was satisfied that it was wholly unsafe to allow the conviction and sentences which the learned trial judge had recorded against the accused on the second count to remain. This court, therefore, upheld the order of acquittal of the accused on the first count and quashed the accused's conviction on the second count and set the accused at liberty.

First appeal dismissed and second appeal allowed and conviction and sentence quashed.

Reported by Kanesh Sundrum